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NO. _____

Supreme Court, U.S.
FILED
DEC 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

____o____

IN RE BERNARD H. GOLDSTEIN,
Petitioner.

____o____

PETITION FOR WRITS OF MANDAMUS
AND WRITS OF PROHIBITION

____o____

__ o __

PETITIONS FOR ORIGINAL WRITS OF MANDAMUS AND WRITS OF PROHIBITION VERSUS THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ET AL

__ o __

Daniel B. Blake, III
Attorney for Petitioner
Bernard H. Goldstein
910 17th St, NW., Suite 201
Washington, D.C. 20006
(202) 293-4850
(703) 549-4283

5. Whether the condition had developed deliberately or inadvertently, can the Federal Courts permit the timing, orchestrating and even manipulating of the FRCPs, FRAPs and RICO to result in litigants like Goldstein (and even the Profit Sharing Plan) being caught in "Procedural traps" so that they can be effectively denied procedural due process of law which defacto results in confiscating millions of dollars of their property and in that sense depriving them of substantive due process in violation of the 5th (Fifth) Amendment.

6. The Federal Courts should be "...mindful of the possible lethal and drastic effects of (a series of) Partial Summary Judgments, their aims and targets and be ware of possible overkill..." See pages 3, 5 and 11 below.

Brunswick Corp. v. Vineberg

(CA 5th 1967) 370 F2d 605, 612 12

TABLE OF CONTENTS

	PAGE
Questions Presented	(i)
Table of Authorities	(ii)
a. Cases	
b. Constitutional and Statutory Authorities	(iii)
Opinions Below	4
Jurisdiction	1
Statement of Case	5
Introduction	1
Argument	6
Conclusions	16

TABLE OF AUTHORITIES

CASES

- Berger v. U.S. (1920) 255 US 22, 36 — 13
- Browder v. Dir. of Illinois Dept. of Corrections (1973) 434 U.S. 257 272-273; 54 L ED 2d 523, 536. — 7, 18
- Brunswick Corp. v. Vineburg CA 5th 1967 370 F2d 605, 612 12. — (i)
- Crawford et al. v. La Boucherle Barnard et al and Donovan v. Goldstein et al (CC DC-1987) 815 F2d 117-123 84-5627 et al. — 6, 17

CASES

	PAGE
o Crawford et al, Respondents v. Goldstein et al Petitioners (In the U. S. Supreme Court in No. 87-281) No. 83-0780, No. 83-0940.	2, 3, 4, 7, 8, 9 10, 11, 12, 15, 17, 18
o Ex Parte Taylor, (1893) 149 U.S.164, 181, 13SCt.785, 789	21
o Durret v Washington National Insurance Co., (1980) 621 F 2d 201.	21
o Goldstein v. Schotland et al. CA No. 87-0228, (Dist. Ct.,) and No. 87-5297 in the Circuit Ct. of Appeals. (Pending) B. Goldstein, Pro Se.	2, 3, 5, 14, 18, 20, 23, 29
o In Re Goldstein, No. 87-5384 (Pet. for Writ of Mandamus in Cir. Ct. of Appeals - Pending) B. Goldstein, Pro Se.	2, 20
o In Re Goldstein, No (Pet. for Writ of Mandamus being filed in U.S. Supreme Court - Current) (12/14/87).	6
o Issacs v Hobbs Tie and Timber Co., (1931; 282 U.S. 734, 737, 51 S Ct 270, 272;	21
o Sedima, S.P.R.L. v. Imrex (7/1/85) 105 S.Ct. 3275, 473 U.S. 479, 496 - 498, 87 L.Ed 2nd 346, 359.	6, 18
o State Ex Rel. Gary Railways Inc. v. Judge Roszkowshi, (Ind. 1953)	5, 6, 16, 26, 30

PAGE

STATUTES AND RULES

o ERISA (29 USC Sec. 1101-1109)	4, 10
F.R.A.P. (Fed. Rules of Appellate Procedure)	(i)
F.R.C.P. (Fed. Rules of Civil Procedure) (Rule 60(b) Motion (F.R.C.P.)	(i) 4
RICO (18 USC Sec. 1964 (c)	4
Rules 26 and 27 - U.S. Supreme Court	1
28 USC 1254	1
28 USC 114	13
28 USC 455	13
29 USC 956	1
29 USC 1651	1

OTHER AUTHORITIES

5th Amendment of U.S. Constitution	(i)
Fairfax County (Va.) Deed Records Vol. 6542 at page 180.	5

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

____o____

IN RE BERNARD H. GOLDSTEIN

____o____

PETITION FOR WRITS OF MANDAMUS
AND WRITS OF PROHIBITION

Introduction:

Pursuant to Jurisdiction and Authority created by 29 USC 1651, 29 USC 959, Rule 21 of FRAP and Rules 26 and 27 of this Supreme Court, and in order and to prevent injustice by the piece-meal disposition of individual issues that in fact require the understanding of related issues in this overall complex litigation, Goldstein, files this Petition for Writs of Mandamus and Prohibition:

STATEMENT OF ISSUES PRESENTED

In addition to facts and issues related in Counts One through Count Five below and "in aid of the Courts appellate

jurisdiction", Petitioner suggests that at this stage of this complex litigation, "adequate relief cannot be had in any other forum or from any other court" than by this writ under Rule 26 of this Court.

1. Considering the heavy case load of this Supreme Court, the most practical solution to this complex litigation is to reverse and remand Case No. 87-281 which is now pending on a 12/3/87 Petition for Rehearing in this Court so that it may be consolidated (See Count Three below) with a Court CA Case 87-0228 now docketed on 9/28/87 (Exhibits Vol. IV, E-225) on appeal in the Circuit Court of Appeals for the District of Columbia in Case No. 87-5297 and under No. 87-5384; the latter is under a 9/2/87 Original Writ of Mandamus (still pending). (See Exhibits Vol. IV, E -p. 232.)

PARTIES AND RULINGS

2. Parties for this Writ are:

a. The parties in Case No. 87-281 are also parties ..." for this Petition. They are Bernard H. Goldstein, (Petitioner); Roy A. Schotland, (Receiver); Department of Labor, (Respondent); and Crawford et al. (Respondents) represented by William Osborn and James Roy, Washington, D.C. Attorneys.

b. The parties in Cases CA 87-0228 (in District Court) and in No. 87-5297 and No. 87-5384 (in the Appellate Court) are listed below. In addition to those in Para. 2 a above, they include: Madison National Bank, Robert Dolan, 495-395 Associates, Gary Hurst, Trustee for Shirley Beltway Ltd. Partnership and Hurst Property Company.

c. The judges of the Circuit Court of Appeals and/or the Panel thereof, are Respondents. Also, a Respondent is the Judge of the District Court, Judge Thomas

Penfield Jackson. In addition, as provided for below, and in 3 a above the Secretary of Labor and the Receiver, Roy A. Schotland should be served with Writs hereunder. Furthermore, service should be made on the Solicitor General, Charles Fried, representing the Department of Labor.

4. Rulings

a. Rulings in Case No. 87-281 are:

(1) The Court of Appeals on 3/27/87 (Pet. 1a-13a) recognized "offset" under ERISA (29 USC 1101) and appears to affirm the 7/6/86 RICO order but failed to rule on several key issues on appeal, namely (a) a 60(b) Motion and (b) an order approving the private sale of BRIL real estate. Petition for Rehearing was denied by the Appellate Court on 5/21/87. (Pet. 13a-15a)

(2) Petition for Certiorari filed 8/16/87 / was denied on 11/9/87 by this Supreme Court and pending is a Petition for a Rehearing which was filed 12/3/87.

b. Rulings in CA No. 87-0228:

(1) 1/30/87 and 2/9/87 Complaints were filed requesting a constructive trust on the BRIL real estate purchased by Robert Dolan at a flawed foreclosure sale for $535,000 on 2/27/85 and sold to Gary Hurst on 11/6/86 for $2,500,000 and $3,100,000 as a "fair market price." **

FOR DETAILED STATEMENTS OF THE CASE*

5. In addition to statements above and below, see the following references to Goldstein Appellate Court Briefs, copies of which are included in Exhibits Vol. III, P, Q, R, S, pp. E-110 to E- 205.

* For comparison, note the procedure followed in State Ex Rel Gary Railways, Inc. v Roszkowski, 110 NE 2 746.. In this case as in that Gary Railway Case, if just cause not shown by the stated date, the 3/27/87 decision of the Appellate Court would be reversed by this Court.

** See: Fairfax County (Va.) Deed Records Vol. 6542 at page 180.

FOR DETAILED STATEMENT OF FACTS*

6. In addition to statements above and below see the following references to Goldsteins' Appellate Court Briefs, copies of which are included in Exhibits Vol. IV, U, V, W, pp. E-220 to E-254.

COUNT ONE

7. For reasons stated herein and by an original Writ of Mandamus this Supreme Court should order the United States Court of Appeals for this Dist. of Columbia to show cause to this Court by not later than January 5, 1988 why the 3/27/87 decision of that court should not be reversed by this Court. Specifically that 3/27/87 decision should be reversed because by making that 3/27/87 decision the Appellate Court failed to follow two US Supreme Court precedents namely:

a. Sadima et al. v. Imprex, 473 US 479, 496, 497 & 498; 87 L Ed 2d 346, 359.

b. Browder v. Illinois Dir. of Corrections (1973), 434 US 257, 272, 54 L. Ed. 523, 536. A clear concise statement of these reasons for such a reversal of this 3/27/87 appellate court decisionsare stated in Goldstein's 11/3/87 Reply Brief for his 8/16/87 Petition for a Writ of Certorari in Case No. 87-281. To avoid unnecessary repetition the detailed reasons given in that brief are incorporated hereby reference and a copy of it is included as Goldstein Exhibit Vol. IV, X p. E-255.

COUNT TWO

3. For reasons stated herein in order to conserve and protect the real estate asset of BkIL Real Estate Partnership, which is the subject of Appeals to this Supreme Court in Case No. 87-281 and which is currently in the protective custody of a federal equity court receiver in Federal District Court in CA No. 33-0780 and No. 83-

0940, this Supreme Court should by Writ of Mandamus issue specific orders to the two fiduciaries (in CA 83-0780 and No. 83-0940) the Dept. of Labor, and to the Receiver, Mr. Roy A. Schotland in No. 83-0780 and No. 83-0940), and these specific orders should provide:

a. That each (as a part of its or his fiduciary duty) should by negotiation or litigation establish for the benefit of the BRIL Real Estate Partnership a constructive trust on the BRIL Partnership Real Estate (or windfall profits) which are currently in the physical possession of Mr. Robert Dolan, Mr. Gary Hurst, the Shirley Beltway Ltd. Partnership and 495-395 Associates under flawed foreclosure sales referred to in Paragraph 4, b, (1) above.

COUNT THREE

9. For reasons stated herein this Supreme Court should mandate the Appellate Court to consolidate the following

litigation for review by it so that the U.S. Circuit Court of Appeal prospective decision on this overall litigation can be reviewed on appeal or Certiorari as this Surpeme Court may deem necessary:

"... in aid of the [US Supreme] Courts appellate jurisdiction..." under its Rule 26 in event that ... this Supreme Court subsequently decides that ...such appellate court ....action hereby mandated" needs further appellate court review by this Court.

B. Also the Court of Appeals or this Supreme Court can write a potential landmark opinion that clarifies the related meanings of "offset", "forfeiture", "restitution" and equity of redemption (Cf. p. 14 of Goldstein's 12/3/87 Petition for Rehearing).

COUNT FOUR

10. That in addition to paragraph 7 above, this Supreme Court by an original writ of Mandamus and Prohibition should order the Appellate Court to take the following action namely:

(a) To consolidate under its direction and control all the interrelated and interdependent issues involved in this overall litigation to the end that equal justice be done for all litigants. (1) That this shall include restitution to the Plaintiffs if and to the extent that restitution is due under ERISA. (29 USCA 1109) (2) But on the other hand, it should not include the unjust enrichment of Plaintiffs at the unnecessary expense and unlawful gouging of the Defendant Goldstein.

(3) As a part of that consolidated litigation the Appellate Court should consider: the following paragraphs in Petitions 12/3/87 Petition for Rehearing, viz:

Paragraphs 2-A, 2-B, 2-D, 2-E, 2-F and 2-G thereof.

COUNT FIVE

11. By original Writs of Mandamus and/or Prohibition this Court should issue the following orders to Judge Penfield Jackson the U.S. District Court Judge for the District of Columbia in the following Cases in CA No. 87-0228, CA No. 83-0780 and No. 83-0780.

a. That he should order the Plaintiffs Attorney John R. Mooney (and or his law firm) to return to the U.S. District Courts Clerks Office for safe keeping, the 4 envelopes of sealed material released to Mr. Mooney with the approval of Judge Jackson on 2/3/87. In addition, he

should assure himself that all of the returned sealed records are complete and that they are accompanied by an affidavit of plaintiffs counsel that all of the sealed records are complete.

b. He (and any US District Court Judge that may succeed him in this litigation) is prohibited from and should not approve the dismissal of the Receiver Mr. Schotland while any part of this overall litigation is pending. This order should include, not only Case No. 87-281 now in this Supreme Court, but also Case No. 87-5297 (including CA No. 87-0228) now pending in the Appellate Court, and also Cases CA No. 83-0780, No. 83-0940 and CA -0228 in the District Court.

c. That after he has administratively taken care of 3 a above and has complied with 3 b above, he should "proceed no further" in this litigation because Goldstein had filed under 28 USC

144 in good faith affidavits on June 15, 1987 and Sept. 9, 1987 that "the judge had a personal bias or prejudice...against him..."

d. Since the Goldstein affidavit is based on personal bias or prejudice against him under 28 USC 144 and not just on familiarity with the previous litigation in the Case under 28 USC 455 Judge Jackson ceased having jurisdiction in this case and in this litigation..." Also see Berger v. U.S., 255 U.S. 22, 36, which should be interpreted so that once it established that the judge has a personal bias or prejudice he should "proceed no further " in any future litigation with that litigant, and that a litigant not only "may" but need to "file only one such affidvait..." ;the District Court Case cited by Judge Jackson to support his refusal to disqualify himself applies only under 28 USC 455 and not under 28 USC 144. See Burger Case above.

e. For reasons stated in para. "d", above, Judge Jackson did not have jurisdiction to make its ruling on 5/22/87. Also any other substantive ruling (as distinguished from administrative action like that suggested in para. 3 a above) is not binding on the Appellate Court in Appeal No. 87-5297. However, since the facts are not in dispute and the appeal was timely filed, the action of Judge Jackson 5/22/87 should not adversely affect the future decision of either the Appellate Court or this Supreme Court.

f. A purpose of this requested writ in this Count Five is to prevent Judge Jackson from taking any further action which may complicate future disposition of this litigation which he might otherwise take in the mistaken belief that Judge Jackson has jurisdiction to do so. And the foregoing applies not only to the DRIL Partnership Real Estate involved in Appeal

No. 37-5297 but also to any other assets now in the custody the Receiver in CA Cases No. 33-0780 and No. 33-0940.

12. This Supreme Court should by Writ of Mandate order Judge Jackson to make available to this Supreme Court and to the Appellate Court the sealed documents described in paragraph 11 above, and in the Special Bill of Exceptions which appears in Attachment No. 1 hereto and in Exhibits IV., 2-220. As disclosed by the Court docket sheets and by the affidavit in the attached Special Bill of Exemptions, these sealed documents, have not been available after Feb. 2, 1987 to either appellate court during the critical periods of their appellate review of these interrelated cases.

CONCLUSIONS

13. A. Your Petitioner suggests to this Supreme Court that preliminary and temporary alternative writs (see and Cf: 110 NE 2d 746 -1953) should be issued on or about December 18, 1987 commanding the defendants listed below to take those actions specified, below, with respect to them or show cause why the same should not be done, and that on or before a preliminary or final hearing to be held on January 5, 1988 at which time a peremptory, permanent and final writ may issue commanding each defendant to take the action specified below with respect to him or them. Compare 110 NE 2d 743.

14. B. In accordance with the foregoing the following separate orders and temporary writs of mandamus and

prohibition should be issued and served on the respondents or the defendants listed below:

(1) To the U.S. Court of Appeals for the District Columbia or a panel thereof (herein called Court of Appeals): This Court of Appeals should show cause, if any, why this Supreme Court should not reverse and remand to the Appellate Court the 3/27/87 Order of the Appellate Court for failing to comply with the following U.S. Supreme Court Cases. In reviewing these cases, this Court should re-examine paragraphs I and II on pages 2-7 of Goldsteins 11/3/87 Reply Brief in Case No. 87-281 in this Court. And, it should review these cases as they apply to the Goldstein litigation in Case No. 87-281 now pending in this Supreme Court on Petition for Rehearing, viz:

a. Sedima et al v. Imprex Co. (1985) 473 U.S. 479, 496, 497 499; 87 L Ed 2d. 346, 359.

b. Browder v. Ill. Dir. of Corrections (1973), 434 U.S. 22, 36 ; 54 L. Ed. 523, 536

(2) To the Court of Appeals: This Appellate Court should show cause why, if any, the Court of Appeals should not consolidate in the Appellate Court the following cases:

a) Case No. 87-281 now pending on a 12/3/87 Petition for Rehearing in this Supreme Court. (See and note Para. 14-B-(1) above.

b) District Court (CA) Case 87-0228 now docketed as of 9/28/87 on Appeal in the Court of Appeals for the District of Columbia in Case No. 87-5297 and under No. 87-5384; the latter is under a 9/2/87 Original Writ of Mandamus and Prohibition.

c) District Court (CA) Case No. 83-0980, No. 83-0780, and No. 87-0223.

(3) To the following fiduciaries in Case No. 87-281 et al:

-- To the Secretary of Labor as represented by his Solicitor in and by the Solicitor General of the United States in Case No. 37-281.

-- To Hoy A. Schotland, Receiver in Case No. 37-281 and other federal courts for the BRIL Real Estate Partnership and the Profit Sharing Plan in Case No. 37-281 and related federal cases. (C.A. No. 83-0780 and No. 83-0940)

a. Each of the foregoing fiduciaries should be ordered to show cause, if any, why each should not (by negotiation or litigation) establish a constructive trust on the BRIL Real Estate and on the "wind-fall" profits resulting from the flawed 11/6/86 sale

of the BRIL Real Estate from Robert A. Dolan et al, to Gary A. Hurst et al.

b. Each fiduciary should (unless otherwise authorized by this Court or the Appellate Court) be ordered to refrain form terminating the current receivership under Cases No. 87-281, No. 83-0780, 83-0940, and 87-0228.

____o____

Basic Reasons and Justifications For All Writs

____o____

c. The justification for and reasons for the creation of these constructive trusts in para. 3a above is stated concisely in paragraphs 3, 4, and 5 on pp. 2, 3, and 4 of Goldstein's Supplemental Brief in Case No. 87-281 in this Supreme Court. It has been and is being developed in Cases No. 87-0228 and No. 87-5297 and No. 87-5384. All involve the enforcement of and the

protections of the property rights of Bernard Goldstein and the BRIL Partnership under the following U.S. Federal Law Cases:

Issacs v. Hobbs Tie & Timber Co. (1931) 282 US 734, 737, 51 S Ct 270, 272.

ExParte Taylor (1893) 149 US 164, 181; 13 S Ct 785, 789.

Durret v. Wash. Nat'l Ins. Co. (1980) 621 F 2d 201, 203-204.

The fragmentation of this litigation over the ownership of the BRIL Partnership Real Estate in the District, Appellate and Supreme Courts, all in Federal Courts, emphasizes the urgency of consolidating all of this litigation in this Court or, preferably and currently, in the Appellate Court or a panel thereof. This consolidation of issues is the basic objective and thrust of this Petition for this extraordinary writ and this is also

concisely stated in Paragraph 3, 4 and 5 on pages 2, 3, and 4 of Goldstein's 11/3/87 Supplemental Brief in Case No. 87-281 in this Supreme Court.

The need for this consolidation of inter-related and interdependant issues is stated clearly in paragraph 5 and 6 of the Problems Presented on pages "(i)" of the 11/3/87, Goldstein Reply and Supplemental Briefs, and on page "(i)" of this Petition.

Concerning the issuance, validation, and service of the writs the following suggestions are made. As a part of this verified Petition are drafts of proposed temporary and alternative writs of mandamus and writs of prohibition for validation and issuance by the Clerk of the U.S. Supreme Court for and on behalf of that Court to be returnable on or before December 18,1987. At that time (and at

that hearing) the defendants (or respondants) should show cause, if any, why these temporary writs should not be made permanent.

In addition, it is suggested that service of these temporary writs shall be made on the parties concerned by the Clerks of U.S. District Court and the Circuit Courts of Appeal for the District of Columbia. In this regard, all parties including Mr. Robert Dolan and Mr. Gary P. Hurst in CA Case No. 87-0223 are involved in this litigation relating to the BRIL Partnership Real Estate in Cases before the District and Appellate Court. Under the circumstances independant process servers should not be necessary in order to serve writs on all necessary respondents.

(4)To the U.S. District Court for the District of Columbia Judge Thomas Penfield Jackson (who has participated in all of the foregoing complex litigation) the following orders are directed, viz: This Supreme Court should issue the following commands and orders:

a) That he should direct, order and supervise the return to District Courts' Clerks Office for safe keeping all of the documents under seal which were released by Judge Jackson on 2/3/87 to Plaintiffs Attorneys' (John R. Mooney and William W. Osborne, Jr.) Also, the return of those documents shall be accompanied by an affidavit by said attorneys as to whether all of the returned documents are complete.

b) That he should be prohibited from and should not approve the termination of the Receivership of Mr. Roy A. Schotland without the approval of this or the Appellate Court while any part of this litigation is pending.

c) That after he has administratively taken the action in paragraph 4 a above he should be prohibited from taking any further action in and should "proceed no further" in this litigation because Mr. Bernard H. Goldstein had filed on or before June 15, 1987 in good faith under 28 USC 144 an affidavit that the "judge had a personal bias and prejudice...against him..."

d) That as a consequence of the statements and provisions of paragraph "c" above it now appears that the Judge did not have jurisdiction to issue the 3/22/87 order dismissing Goldstein's

complaints in CA Case No. 87-0228 and as a result thereof that order should be declared null and void. Also, a notation of these facts should be made in any temporary writ of mandamus and prohibition issued by this Court. These alternative writs should be made permanent on January 5, 1988 if not contested by the respondents or defendants (see and Cf. again 110 NE(2)746 [1] and [2], a case in which Petitioner's Attorney participated in 1953).

(5) To Robert Dolan, 495-395 Associates, Gary P. Hurst, Trustee for Shirley Beltway Ltd, Partnership and Hurst Property Company, the following notice is hereby given to each, as the current custodians of the BKIL Partnership Real Estate, and the "windfall" profits from the flawed

11/6/86 sale of the BRIL Partnership Real Estate viz:

(a) A temporary constructive trust should hereby be imposed in favor of the BRIL Partnership on the BRIL Partnership Real Estate and the "windfall" profits from the flawed 11/6/86 sale of the BRIL Real Estate. Also the defendants and respondants in this paragraph 5 are ordered to show cause, if any, on or before January 5, 1988, why that constructive trust should not be made permanent for the duration of this litigation.

15. A. Concerning the issuance, validation and service of the writs and orders the following suggestions are made.

1. Two separate alternative temporary writs to the Appellate Court, to be served through the Clerk of that Court. (See Para. 14-B-(1) and 14-B-(2) above).

2. Two separate alternative temporary writs to each fiduciary; one to the Receiver and one to the Secretary of Labor, each to be served by either the Clerk of the Appellate Court or the Clerk of the District Court. (See Para. 14-B-3 above)

3. One alternative temporary writ to Thomas Penfield Jackson, Judge of the District Court, to include items "a", "b", "c" and "d" of Para. 14-b-4 above; this writ to be served by the Clerk of the District Court.

4. Two alternative temporary orders of this Supreme Court, one directed to Robert Dolan and 395-495 Associates, and the other directed to Gary P. Hurst, the Shirley Beltway Ltd., Partnership and Hurst Property Company to be served on each by the District Court Clerk. (See: Para. 14-B-5.)

B. In addition it is suggested that service of these alternative temporary writs and orders be made on the parties concerned by the Clerks of the U.S. District Court and Circuit Court of Appeals for the District of Columbia. In this regard all parties including:

Mr. Robert Dolan and Mr. Gary P. Hurst in CA Case No. 87-0223 are involved in this litigation relating to the BRIL Partnership Real Estate in Cases before the District and Appellate Court. Under the circumstances independent process servers should not be necessary in order to serve orders or writs on all necessary respondents.

Although not literally a writ of mandate ; nevertheless, it is timely and appropriate for this Supreme Court in a current order to impose this constructive trust in order to

facilitate the consolidation of the different fragmented parts of this complex litigation.

WHEREFORE: A. Your Petitioner suggests to this Supreme Court: (1) That original temporary alternative writs of mandamus and prohibition should be issued to the defendants as stated under Conclusions above, (2) That it command each of the defendants or respondents to take the action specified in each temporary writ, and (3) That this Court order each of the defendants (or respondents) to show cause, if any, on/or before January 5, 1988, why the said orders or writs of mandamus and/or prohibition should not be made permanent (Cf 110 NE 746).

B. Also each writ should refer to the Count or paragraph (in the accompanying Petition) to which it refers as outlined in Conclusions above.

Respectfully submitted,

Daniel B. Blake, III
Attorney for Petitioner
Bernard H. Goldstein

Affidavit

State of Virginia)
City of Alexandria) ss.

The statement in this Petition are true and correct as I verily believe.

Counsel for Petitioner

Subscribed and sworn to before me on this 15th day of December, 1987.

Notary Public

(SEAL)

My commission expires: June 14, 1991

CASE NO.

IN THE
SUPREME COURT OF THE
UNITED STATES

____o____

IN RE: BERNARD H. GOLDSTEIN

____o____

IN THE PETITION OF BERNARD H. GOLDSTEIN FOR AN EXTRAORDINARY WRIT OF MANDAMUS AND PROHIBITION

____o____

A SPECIAL BILL OF EXCEPTION BY AFFIDAVIT OF DANIEL B. BLAKE, III.

____o____

AFFIDAVIT OF DANIEL B. BLAKE, III RELATING TO DOCUMENTS NOT AVAILABLE TO THE UNITED STATES COURTS OF APPEALS FOR CONSIDERATION IN CASE NOS. 84-5627, ET AL AND NOT AVAILABLE TO THE SUPREME COURT OF THE UNITED STATES IN CASE NO. 87-281

____o____

Certain sealed documents were ordered returned to the Plaintiff's Counsel by the United States District Court on Februrary 3, 1987; approximately 53 days before the March

27, 1987 ruling of the United States Court of Appeals in Case Nos. 84-5627 Et. Al. The contents of these sealed documents are still not available to Petitioner or to the Appellate Courts.

The results of this action by the United States District Court may have deprived the United States Court of Appeals and the Supreme Court of the United States of information relevant to their ajudication of Case No. 84-5627 on March 27, 1987 and their denial of request for Reconsideration on May 21, 1987.

This action of the District Court was not included in the Court Records until June 17, 1987 (Exhibits F and G). All parties to this litigation were not advised of the actions of the United States District Court; examination of the Docket Sheets in CA

83-0780 and 83-0940 by the Defendant, (Appellate) Bernard H. Goldstein revealed the action.

CONCLUSION

The accuracy of these statements can be confirmed by examination of the Docket Sheets in Case Nos. 83-0780 and 83-0940, and 84-5627, Et Al.

It is requested that this Court order that these records be made available for examination by the United States Court of Appeals for Case No. 84-5627 et al, and by the Supreme Court of the United States for Case No. 87-281.

Respectfully submitted,

Daniel B. Blake

Daniel B. Blake, III

State of Virginia
Subscribe to and Sworn before me this
12TH day of December, 1987.

Notary Public
Exp 7-28-89

E-222

CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

F *

Crawford 3/2/87

vs.

Berrard

Civil Action 83-790/83-940

Dear Judge Jackson,

Laing Bowles, our Clerk's Office Intern, is completing an audit of the approximately 2400 pieces of material in our vault. He is hoping to complete this project by March 31, 1988.

The Clerk's Office has envelopes of sealed material that were filed in the above entitled action. This material is taking up needed space in our vault. The docket indicated that appeals have been exhausted and the last date of any activity was 6/30/86.

We are requesting one of the following courses of action:

2-3-87

✓ Return the documents to counsel. (If the counsel don't wish the material we will shred and destroy.)

____ Retain material in vault.

____ Send to chambers for review.

*

REBECCA J. T. BATES
Manager Courtroom Division

* NOTE: All handwritten entries are disclosed on Documents F and G. Cf. Exhibits Vol. IV p. E-220.

CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

G

2/27/87

John R. Mooney

RECEIVED MAR - 4 1987

Crawford, et al vs. Bernard, et al

Civil Action 83-78c/83-940

The Clerk's Office has 4 envelopes of sealed material that were filed by you in the above entitled action on 7/8/83, 6/30/83, 1/30/85, 4/8/85.

FILED

JUN 17 1987

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

This material is taking up needed space in our vault. The Court has therefore, directed us to return this material to you or, if you desire, we will shred and destroy the material. If you wish us to destroy the material, please so indicate on the enclosed copy of this letter and return it to this office in the envelope provided.

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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

—o—

IN RE BERNARD H. GOLDSTEIN, Petitioner.

—o—

PETITION FOR WRITS OF MANDAMUS
AND WRITS OF PROHIBITION

—o—

SUPPLEMENTAL BRIEF
AND APPENDIX

— o —

PETITIONS FOR ORIGINAL WRITS OF MANDAMUS AND WRITS OF PROHIBITION VERSUS THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ET AL

— o —

Daniel B. Blake, III
Attorney for Petitioner
Bernard H. Goldstein
910 17th St, NW., Suite 201
Washington, D.C. 20006
(202) 293-4850
(703) 549-4283

SUPPLEMENTAL BRIEF
AND APPENDIX
INDEX AND TABLE OF
CONTENTS

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Page

Pursuant to to the United States Supreme Court Rules 16.6, 21.1 (k) (iv), 27, and 30, the following is submitted herewith:

A. Court Orders for Case No. 87-281 for Petition for Writ of Certiorari filed on 9/16/87 in the Supreme Court of the United states:

1. The 3/37/87 Decision of the Circuit Court of Appeals for the District of Columbia Circuit (Reported in 815 F 2d 115-123; Also see the Appendix to the 9/16/87 Petition) 1a - 13a

2. The 5/21/87 Denial by the Appellate Court of Petition for Rehearing and Rehearing in Banc (See Appendix attached to the 9/16/87 Petition) 14a - 15a

Page

3. The 11/9/87 Denial by the Supreme Court of the Goldstein Petition for a Writ of Certiorari 16a

4. A 12/12/87 Affidavit Re Sealed Documents, which Affidavit is attached to Petition filed 12/15/87. 17a-23a

B. Court Orders for Case No. 87-0228 (in the District Court) and now on appeal in No. 87-5297 in the Appellate Court. Also document for interrelated and pending Petition for Writ of Mandamus filed in the Appellate Court on 9/2/87. Case No. 87-5384)

1. The 1/30/87 and 2/9/87 Complaints: For a brief summary see: Para. 4b on page 5 of the Madamus Petition dated 12/15/87.

2. The 5/22/87 and 6/12/87 District Orders. 24a-25a

3. The 7/20/87 Notice of Appeal 26a-27a

4. The 9/28/87 Appellate Court Docketing Statement (No. 87-5297) 28a

Page

5. A 9/2/87 Petition in the Appellate Court for Writs of Mandamus (Case No. 87-5384) 29a-30a

6. A 6/4/87 Affidavit for Recusal of a Judge for Bias and Prejudice under 28 USC 144 31a-36a

C. Reference to Related Briefs and Documents in the Official Files. (See Rule 30 including/ 30.7)

1. Concerning the current Petition for for a Writ for Certiorari in Case No. 87-281.

a. A 11/3/87 Reply Brief.

b. A 11/3/87 Supplemental Brief.

c. A 12/3/ Petition for Rehearing.

d. A 12/15 Petition for a Writ of Mandamus.

2. Concerning the 3/27/87 Appellate Court Decision and Related Rule 60(b) Motion:

a. A 1/31/85 Goldstein Brief.

b. A 5/3/85 " " Brief.

c. A 6/17/85 " " Brief.

d. A 1/10/86 Supplemental Brief.

e. A 1/21/ Citation of Supplemental Authorities.

Daniel B. Blake
Attorney

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5627

HENRY CRAWFORD, et al.

v.

LA BOUCHERIE BERNARD LTD., et al.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

No. 84-5628

RAYMOND J. DONOVAN, SECRETARY,
U.S. DEPARTMENT OF LABOR

v.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

ROY A. SCHOTLAND, ESQ., RECEIVER,
DISTRICT HOTEL SUPPLY, INC.
PROFIT SHARING PLAN

HENRY CRAWFORD, et al., INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 84-5770

HENRY CRAWFORD, et al.

v.

LA BOUCHERIE BERNARD LTD., et al.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

No. 84-5771

RAYMOND J. DONOVAN, SECRETARY,
U.S. DEPARTMENT OF LABOR

v.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

ROY A. SCHOTLAND, ESQ., RECEIVER,
DISTRICT HOTEL SUPPLY, INC.
PROFIT SHARING PLAN

No. 84-5946

HENRY CRAWFORD, et al.

v.

LA BOUCHERIE BERNARD LTD., et al.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

No. 84-5947

RAYMOND J. DONOVAN, SECRETARY,
U.S. DEPARTMENT OF LABOR, et al.

v.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

ROY A. SCHOTLAND, ESQ., RECEIVER,
DISTRICT HOTEL SUPPLY, INC.
PROFIT SHARING PLAN

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 83-00780 and 83-00940)

Argued January 17, 1986

Decided March 27, 1987

Daniel B. Blake, III for appellants in Nos. 84-5627, 84-5628, 84-5770, 84-5771, 84-5946 and 84-5947.

William W. Osborne, Jr., with whom *Jonathan G. Axelrod* and *James S. Ray* were on the brief for appellees, Crawford, et al. in Nos. 84-5627, 84-5628, 84-5946 and 84-5947.

Ellen L. Beard, Attorney, Department of Labor, with whom *Thomas L. Holtzman*, Attorney, Department of Labor was on the brief for appellee, Secretary of Labor in Nos. 84-5627, 84-5628, 84-5770, 84-5771, 84-5946 and 84-5947.

Before: MIKVA and BORK, and HAROLD H. GREENE,* *District Judge*.

Opinion for the Court filed by *District Judge* GREENE.

GREENE, *District Judge*: This case presents primarily the question whether, notwithstanding the so-called anti-alienation provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Act authorizes a court to offset a party's interest in a plan covered by that statute against a judgment based on the party's breaches of duty to the same plan. For the reasons discussed below, we conclude that ERISA does allow such an offset.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

I

Appellant Bernard Goldstein, defendant below, was chief executive officer and majority owner of two corporations, La Boucherie Bernard, Ltd., and District Hotel Supply, Inc. Bernard Goldstein was also a participant in and trustee of a profit-sharing plan established for the corporation's employees, the District Hotel Supply, Inc., Profit Sharing Plan. Appellant Jack Goldstein, Bernard's brother, also a defendant below, was an employee of both corporations and a participant and trustee of the Plan.

In 1978, Bernard Goldstein, along with his wife and two children, established a partnership called BRIL Associates for the purpose of purchasing real estate in Virginia on which to build a new company headquarters. On December 14 of that year, BRIL bought real estate in Fairfax County, Virginia, from the Shell Oil Company, the purchase being financed by a first mortgage from Madison National Bank and a second mortgage from Shell Oil.

During the next three years a series of transactions occurred involving the Goldsteins' profit sharing plan and the BRIL property in Fairfax. Details aside, the Goldsteins ultimately transferred some $461,000 in Plan assets to BRIL or for BRIL's benefit. The Goldsteins never repaid this money to the Plan; they made nc agreement to repay the money; and they made no provision to pay interest on the amount so "borrowed."

Between May 1980 and June 1982, the Goldsteins also transferred $163,000 from the Plan to La Boucherie Bernard, a corporation that was predominantly owned by Bernard Goldstein and that was also a Plan sponsor. Additionally, they used Plan assets within that same time period to satisfy a tax obligation of La Boucherie Bernard; declared a contribution to the Plan which was never paid; and engaged in other transactions in violation of their fiduciary duties under ERISA.

Suit was brought by fifteen participants in the Plan,[1] including appellee Crawford, and on January 20, 1984, the District Court granted summary judgment in favor of the Plan against the Goldsteins, upon a finding that the latter had breached their fiduciary duties as Trustees of the Plan and had violated ERISA's prohibited transactions provisions by misusing Plan assets for their own benefit and that of others. *See* ERISA §§ 404(a)(1)(A), (B), and (C), 406(a)(1)(D), and 406(b)(1) and (2), 29 U.S.C. §§ 1104(a)(1)(A), (B), and (C), 1106(a)(1)(D), and 1106(b)(1) and (2) (1982).

The judgment thus entered against Bernard and Jack Goldstein jointly and severally was for $976,822.38, and the judgment against Bernard Goldstein alone for $20,999. On July 6, 1984, when the Goldsteins had failed to pay any of the judgments, the court granted the motion of the Plan participants for equitable enforcement of these judgments, and it ordered the Goldsteins' own beneficial interests in the Plan to be offset and applied to their judgment debts. It is the July 6, 1984 order that is before us on this appeal and, as noted, the issue[2]

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[1] These Plan participants were employees or former employees of Boucherie Bernard.

[2] The Goldsteins also argue somewhat mysteriously that the order was a confiscation of their property in violation of the Fifth Amendment to the United States Constitution, but no authority is cited for this proposition, and it entirely lacks merit. Moreover, since the Goldsteins did not file a timely notice of appeal from the underlying ERISA judgment, we lack jurisdiction to review the merits of the breach of duty issues and will consider only the issue of offset. The District Court's order granting summary judgment to plaintiffs under ERISA, and certifying that judgment as final under Fed. R. Civ. P. 54(b), was issued on January 20, 1984. The corollary judgment was entered on the court's docket sheet on April 10, 1984. The first notice of appeal was not filed until September 4, 1984, nearly five months later.

Under Fed. R. App. P. 4(a)(1) and 28 U.S.C. § 2107, the notice of appeal in a civil case such as this must be filed

here is whether the court had the power to order such an offset.

II

ERISA is a comprehensive remedial statute enacted to:

> protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b).

Under section 409(a) of the Act, 29 U.S.C. § 1109(a), a person who breaches his fiduciary duties to a pension plan "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate." Section 502(a) of the statute, 29 U.S.C. § 1132(a), in turn authorizes the Secretary of Labor and any plan participant, beneficiary, or fiduciary to bring a civil action "for appropriate relief under section [409]" or to obtain an injunction or "other appropriate equitable relief" to redress a fiduciary violation.

As may be deduced from this language, where a party has breached his fiduciary duty, the courts have broad authority under the statute to fashion remedies for re-

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within 60 days after entry of the judgment or order appealed from. While the District Court may extend this filing time for up to 30 days, the Goldsteins never moved for an extension of time, and their notice of appeal was thus late by almost three months. *See Browder* v. *Director, Illinois Dept. of Corrections*, 434 U.S. 257, 264 (1978); *Moorer* v. *Griffin*, 575 F.2d 87 (6th Cir. 1978). Finally, it is clear that, contrary to the Goldsteins' argument, the ERISA judgments were not interlocutory but final since, as the Goldsteins concede in their brief (at 13), the District Court entered final judgment under Rule 54(b).

dressing any breach and for protecting the interests of participants and beneficiaries. *See, e.g., Donovan* v. *Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983) (upholding order requiring appellants to post $1 million bond). The legislative history of section 409(a) further underlines what is apparent from the statutory language. Thus, the Report of the Senate Committee on Labor and Public Welfare states that:

> The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations . . . . *The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts* . . . .

S. Rep. No. 93-127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4871 (emphasis added). Similarly, Senator Harrison A. Williams, Chairman of the Committee, made clear the congressional direction to the federal courts to draw on principles of traditional trust law, stating that:

> The objectives of these provisions are to make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.

120 Cong. Rec. S-15737, Aug. 22, 1974, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5177, 5186; *see also Eaves* v. *Penn*, 587 F.2d 453, 462 (10th Cir. 1978).

Trust law contemplates the use of broad and flexible equitable remedies as means for dealing with breaches of fiduciary duty, and it imposes the obligation upon the courts to use the remedy that is most advantageous to the participants and that will most closely effectuate the purposes of the trust. *Id.*

The District Court's order in this case to offset the Goldsteins' interests in the Plan in satisfaction of their

judgment debt is fully consistent with these principles. When plaintiffs requested such an order, their final judgment against the Goldsteins had already remained unpaid after some six months. In the absence of an offset order, the Receiver of the Plan might well have been obligated to include the Goldsteins in a distribution of Plan assets to all eligible participants, in accordance with the governing Plan documents.[8] Since the Goldsteins held more than sixty per cent of the beneficial interest in the Plan, such a distribution would in effect have further rewarded them for their wrongdoing, and innocent Plan beneficiaries would still not have received their due.

Rather than to allow such an inequity, traditional trust law would clearly support the forfeiture of the beneficial interest of a breaching fiduciary in order to offset the losses suffered by the trust. As one authority on trusts states:

> If a beneficiary is also a trustee of his own trust, acting for himself and others, it is elementary that as trustee he owes the beneficiaries a duty to perform the trust and not to violate it, and that if he steals trust funds, or causes damage to the trust estate in other ways, his share under the trust . . . will be taken by the court in order to make good the loss.

Bogert, *Trusts and Trustees* § 191, at 484 (2d ed. 1979). Professor Scott has reached the same conclusion, stating that:

> [i]f the trustee is also one of the beneficiaries . . . the other beneficiaries can compel him to make good the breach of trust out of his beneficial interest in the trust property. The defaulting trustee-beneficiary

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[8] Such a distribution might have been called for, for example, if the corporate assets had been sold to another corporation. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), requires a fiduciary to act in accordance with the documents and instruments governing the plan to the extent that they are consistent with the provisions of the Act.

> is not entitled to receive his share of the trust property until he has made good the loss which resulted from his breach of trust. The other beneficiaries can insist that his interest be impounded to make good the loss; they are entitled to a charge upon his interest to indemnify them for the loss.

III *Scott on Trusts* § 257, at 2201 (3d ed. 1967).

In short, the offset remedy adopted by the District Court is not only consistent with ERISA's purpose of providing effective remedies for fiduciary breaches, but it is also among the traditional trust principles that Congress intended to be incorporated into the law of employee benefit plans under ERISA.

III

The Goldsteins argue, however, that ERISA's anti-alienation provision calls for a different result. This provision, section 206(d)(1) of the Act, 29 U.S.C. § 1056 (d)(1), mandates that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Moreover, an identical provision in section 401(a)(13) of the Internal Revenue Code of 1954, 26 U.S.C. § 401(a)(13), has been interpreted by the Treasury Department to prohibit not only voluntary assignment and alienation, but also attachment, garnishment, or levy by operation of law. 26 C.F.R. § 1.401(a)-13(b)(1). Indeed, the Secretary of Labor has recognized that most courts have construed section 206(d)(1) to prohibit the garnishment of pension benefits by creditors, and that the legislative history of the statute supports that interpretation. *See, e.g., General Motors Corp.* v. *Buha*, 623 F.2d 455 (6th Cir. 1980) (section 206(d)(1) includes "all encroachments, both voluntary and involuntary").

The anti-alienation rule has not been regarded as immutable, however. For example, various decisions have implied a limited exception to permit the garnishment of plan benefits in order to satisfy family support and

community property obligations contained in divorced decrees. *See, e.g., American Telephone & Telegraph Co.* v. *Merry*, 592 F.2d 118 (2d Cir. 1979), and *Stone* v. *Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied sub nom. Seafarers International Union, Pacific District—Pacific Maritime Association Pension Plan* v. *Stone*, 453 U.S. 922 (1981).[4]

Similarly, the garnishment of an employee's pension fund interest has been permitted to satisfy liabilities arising from his criminal misconduct toward his employer. *St. Paul Fire and Marine Insurance Co.* v. *Cox*, 752 F.2d 550 (11th Cir. 1985). In that case, the Eleventh Circuit expressly rejected an argument that, since the anti-alienation provision of ERISA prevented assignment of plan funds to individual claimants, they also prevented the fund from garnishing defendant's interest. Said the court: "[t]here is no reason to conclude that ERISA requires the abrogation of the equitable principle that a wrongdoer should not benefit from his misdeeds," and that "[o]f prime importance to the courts in considering implied exceptions to the non-alienation provisions have been the congressional objectives behind ERISA, and the effect of the proposed exceptions on those goals." *Id.* at 552 (citing *American Telephone & Telegraph* v. *Merry*, *supra*, 592 F.2d at 120-25; *Cartledge* v. *Miller*, 457 F. Supp. 1146, 1154-56 (S.D.N.Y. 1978)).

We agree with the Eleventh Circuit. ERISA was established to protect "the continued well-being and security of millions of employees and their dependents" by providing "minimum standards . . . assuring the equi-

---

[4] Further, a participant or beneficiary may make voluntary and revocable assignments, totaling not more than ten per cent of future benefit payments, once benefits are in "pay status" and provided that the voluntary assignment is not intended to defray plan costs; and benefits may be pledged as collateral to secure loans from the plan, if the plan so permits. R. Osgood, *The Law of Pensions and Profit Sharing* § 1.9.4 (1984).

table character of [pension fund] plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001(a). Given the fundamental congressional purpose to have the courts apply trust principles to disputes such as this, and given that the law of trusts is grounded in a strong equitable policy not to permit a trustee to benefit from his own breaches, we have no difficulty in concluding that the anti-alienation portion of the statute does not stand in the way of the remedy adopted here. A contrary interpretation would permit trustee wrongdoers to benefit from their misdeeds at the expense of those whom ERISA was designed to protect. Under such a construction, the Goldsteins, who repeatedly and indeed blatantly breached their fiduciary duties to the pension plan they created, would be allowed to evade their court-ordered responsibility to make restitution for the money they wrongfully obtained, and Plan members and their families would have to watch their pension monies once again disappear into the Goldsteins' pockets.

The Goldsteins argue that to allow an offset under the circumstances of this case would frustrate the protective purposes of ERISA's anti-alienation rule.[5] In the first place, an offset here creates no risk of interference with ongoing Plan operations, since the Plan will cease operating in any event. Moreover, the Goldsteins will not be unfairly deprived of anticipated retirement benefits, since the offset operates as if they were receiving the full amount of benefits they would have received had the Plan had not been depleted by their wrongdoing.[6] Finally, as indicated, the purpose of ERISA's anti-alienation provision—to protect plan beneficiaries by ensuring that plan asests are used only for payment of benefits—would be undermined, not advanced, by an interpretation that pro-

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[5] The purpose of that provision is "to protect a person and those dependent on him from the claim of creditors." *Cartledge* v. *Miller*, 457 F. Supp. 1146, 1156 (S.D.N.Y. 1978).

[6] The amount is merely credited against their judgment debt to the Plan.

hibited offset under these circumstances. The broad equitable remedies authorized by ERISA against fiduciaries who wrongfully deplete plan assets to the detriment of beneficiaries can best—perhaps only—be effectuated here by applying the traditional trust remedy of an offset.

IV

[4] On July 6, 1984, the District Court granted summary judgment in favor of the Profit Sharing Plan, under the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §§ 1961 *et seq.* (1982), and awarded the Plan treble damages against Bernard Goldstein in the amount of $1,995,642.76. Appellant Bernard Goldstein's challenge to this RICO judgment can be disposed of briefly.

First. Appellant argues that he may not be found liable in a civil RICO action without a prior criminal conviction and a separate racketeering injury (other than an injury flowing from the predicate acts). Suffice it to say that appellant's theory was rejected by the Supreme Court's recent decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985).[7]

Second. Appellant contends next that the District Court erred by applying findings of fact made under

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[7] The *Sedima* court said that it could:

> find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists. Accordingly, the fact that Imrex and the individual defendants have not been convicted under RICO or the federal mail and wire fraud statutes does not bar Sedima's action.

Id. at ——; 105 S. Ct. at 3284. Similarly, the *Sedima* court held that there is no requirement that a private plaintiff establish a distinct "racketeering injury". *Id.* at ——, 105 S. Ct. at 3285.

ERISA to the RICO claim, one that thus arose under a different statute. The foundation for this argument is difficult at best to make out, and even more difficult to accept. Bernard Goldstein admitted to making transfers of Plan assets with full knowledge that those transfers were illegal. Such an admission supports not only a finding of a violation of ERISA duties but also a violation of 18 U.S.C. § 664, the statutory predicate for appellant's RICO violation.[4] That statute prohibits "an intentional breach of special fiduciary duties imposed by other regulatory statutes or governing instruments." The same facts underlie both claims, and the same findings of fact may be applied to both.

Third. Appellant also argues that summary judgment was improperly granted because he was denied a jury trial on the issue of intent. This argument is equally meritless. Although state of mind is usually a question for the jury, this does not preclude a court from finding intent, on summary judgment, where that intent "may be inferred from objective facts." *See, e.g., Washington Post Co.* v. *Keogh*, 365 F.2d 965, 967-68 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

Fourth, appellant challenges the District Court's determination of liability, which included a trebling of damages, to over $1.9 million, pursuant to RICO. Appellant asserts that, in fact, he owes only $50,000, and he claims that an award above that amount constituted an abuse of discretion. No support or justification whatever are offered for this bare conclusory statement. In sum, the District Court's application of RICO was proper in all respects.

For the reasons stated, the judgment of the District Court is

Affirmed.

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[4] RICO, at 18 U.S.C. § 1961(1), defines "racketeering activity" as the commission of one of 41 federal and state crimes, including embezzlement from pension and welfare funds under 18 U.S.C. § 664.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMIBA CIRCUIT

—o—

No. 84-5627 September Term, 19
CA No. 83-00780

Henry Crawford, et. al.

v.

La Boucherie Bernard Ltd., et. al.

United States Court of Appeals
For The District of Columbia Circuit

FILED MAY 21 1987

GEORGE A. FISHER
CLERK

And Consolidated Case Nos. 84-5628
84-5770, 84-5771, 84-5946, 84-5947.

BEFORE: MIKVA and BORK, Circuit Judges; HAROLD GREENE*, District Judge, U.S. District Court for the District of Columbia

O R D E R

Upon consideration of petitioners' petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

PER CURIAM
GEORGE A. FISHER, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

* Sitting by designation purusant to 28 U.S.C. Section 292(a).

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19 86

o

CA No. 83-00780

NO. 84-5627

United States Court of Appeals
For The District of Columbia Circuit

Henry Crawford, et. al.

FILED MAY 21 1987

GEORGE A. FISHER
CLERK

v.

La Boucherie Bernard Ltd., et. al.

o

And Consolidated Case Nos. 84-5628, 84-5770, 84-5771, 84-5946, 84-5947.

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges; Harold Greene*, District Judge, U.S. District Court for the District of Columbia

O R D E R

Petitioners' suggestion for rehearing en banc has been transmited to the full court. No member of the court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

PER CURIAM,

FOR THE COURT;
GEORGE A. FISHER, CLERK

Appendix C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

November 9, 1987

Mr. Daniel B. Blake III
Suite 201
910 17th Street, N. W.
Washington, DC 20006

Re: Bernard H. Goldstein,
v. Henry Crawford, et al.
No. 87-281

Dear Mr. Blake:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

Joseph F. Spaniol, Jr.

PUBLISHER'S NOTE:

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING:

17A - 23A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD H. GOLDSTEIN, Plaintiff, v. ROY A. SCHOTLAND, et al., Defendants.

Civil Action No. 87-0228

FILED
MAY 26 1987
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Upon consideration of defendants' several motions to dismiss the complaint, plaintiff's opposition thereto, and the proceedings thereon in open court, it appearing that plaintiff has failed to show sufficient cause why the action should not be dismissed as to all defendants for failure of subject matter jurisdiction, in that plaintiff no longer has an interest in the real property which is the subject matter hereof and, thus, lacks standing to maintain the action, it is, this 22nd day of May, 1987,

ORDERED, that defendants' motions to dismiss are granted, and the complaint is dismissed with prejudice.

27 (N)

Thomas Penfield Jackson
U.S. District Judge

* * *

FILED
JUN 15 1987
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Upon consideration of plaintiff's motion for reconsideration to show cause why this action should not be dismissed and plaintiff's third affidavit in support of his motion for recusal, and the entire record herein, it is, this 12th day of June, 1987,

ORDERED, that plaintiff's motion for reconsideration is denied; and it is

FURTHER ORDERED, that plaintiff's third affidavit, interpreted by the Court as a motion for reconsideration of plaintiff's motion for recusal, is denied.

Thomas Penfield Jackson
U.S. District Judge

THE UNITED STATES DISTRICT COURT
For the District of Columbia

Case No. 87-0228

BERNARD H. GOLDSTEIN, Plaintiff,
Pro Se, : vs.
ROY A. SCHOTLAND, Receiver
et. al.
* * *

RECEIVED
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CLERK
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

— o —

NOTICE OF APPEAL

— o —

Notice is hereby given that the above named Plaintiff, Bernard H. Goldstein, appeals to the United States Circuit Court of Appeals for the Dictrict of Columbia Circuit from the following judgments and orders in this case by the United States District Court for the District of Columbia: 1. The May 22, 1987 order 1). that Plaintiffs Motion to recuse is denied, 2). that Defendants Motions to dismiss are granted and 3) that the Complaint is dismissed with prejudice. (Filed May 26, 1987, copies attached).

2. TheJune 12, 1987 order 1) that Plaintiffs Motion for Reconsideration (to

show cause) is denied, and 2) that Plaintiffs third affidavit for recusal (based on bias and prejudice, interpreted by the Court as a motion for reconsideration of Plaintiffs Motion for recusal), is denied. (Filed June 15, 1987, copy attached).

This Notic of Appeal is made pursuant to the Federal Rules pf Appellate Procedure (FRAP) including Rules 3 and 4 and includes specifically 1) the Courts ruling concerning lack of subject matter jurisdiction and lack of standing, and also 2) the failure of the Court to grant Plaintiffs June 3, 1987 request by affidavit for recusal based on bias and under 28 USCA 144.

July 20 , 1987

Respectfully submitted,

BERNARD H. GOLDSTEIN,
Attorney Pro Se.
4100 Mass Ave. NW, Apt. 115,
Washington, D. C. 20016
(202) 364-7170.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5297 **September Term, 1987**

Bernard H. Goldstein, Civil Action No. 87-00228

Appellant

v.

Roy A. Schotland, et al.

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 28 1987

GEORGE A. FISHER
CLERK

ORDER

It appearing that this new case has been filed and docketed, it is

ORDERED that appellant(s) shall submit an original and three copies of the following documents on or before 10-28-87 :

1. Docketing Statement and Appearance Form
2. Copy of the Decision of the District Court
3. Statement of the Issues to be Raised on Appeal
4. Certificate of Counsel (Gen.R. 11(a)(1))
5. A Report certifying that all necessary transcripts, if any, have been ordered, including the date when the transcript was ordered and a statement that satisfactory financial arrangements have been made with the Reporter. A copy of the Report shall be served on each Reporter.

It is FURTHER ORDERED that appellee(s) shall also submit a Certificate of Counsel pursuant to Gen.R. 11(a)(1), and an Entry of Appearance Form, within the same period.

It is FURTHER ORDERED that the parties shall file dispositive motions, if any, on or before 11-12-87. See Gen.R. (7)(i). Any procedural motion which would

* * *

E-225

RECEIVED
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CLERK OF THE UNITED STATES COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RE: BERNARD H. GOLDSTEIN 87-5384

WRIT OF MANDATE AND PROHIBITION

PURSUANT TO JURISDICTION AND AUTHORITY CREATED BY 28 USC ø 1651, 28 USC ø 959, RULE 21 OF FRAP AND RULES 6(h) AND 6 (i) OF THIS APPELLATE COURT, BERNARD H. GOLDSTEIN, FILES THIS PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA TO ISSUE WRITS OF MANDATE AND PROHIBITION TO BE DIRECTED AS INDICATED BELOW.

1. Cases 83-0780 and 83-0940 have been submitted to THE UNITED STATES SUPREME COURT requesting a WRIT OF CERTIORARI. The status hearing scheduled for September 16, 1987, by the District Court on these cases should be cancelled or postponed pending review by the UNITED STATES SUPREME COURT. (Exhibit A) Any further action by the District Court relating to Cases 83-0780 and 83-0940 could be detrimental to the complete filing of an appeal in case no. 87-0228, a related case.

* * *

CONCLUSIONS -30a-

* * *

A. Cancel or postpone the September 16, 1987, District Court status hearing in cases 83-0780 and 83-0940.

B. Order the RECUSAL of Judge Thomas Penfield Jackson in case 87-0228, as well as 83-0780 and 83-0940, for reasons of BIAS AND PREJUDICE.

C. Order title on the BRIL property to be placed in a constructive trust until the Receiver shows cause why the foreclosure sale of February 27, 1985, was allowed to take place without the legal authorization of the or the District Court application of equity and trust law.

E-234

(4)

This WRIT OF MANDATE AND PROHIBITION should be granted so that orderly resolution of these consolidated cases (83-0780, 83-0940 and 87-0228) and appeals can be resolved in an orderly manner by the United States Court of Appeals and the UNITED STATES SUPREME COURT.

SWORN TO BEFORE ME
THIS 2nd DAY OF
SEPTEMBER, 1987

NOTARY PUBLIC

Respectfully submitted,

BERNARD H. GOLDSTEIN, PRO SE

4100 Massachusetts Ave., N.W.
Washington, D.C. 20016
(202) 364-7170

E-235

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD H. GOLDSTEIN, Plantiff, v. ROV A.SCHOTLAND, et al., Defendants.	)))))	Civil Action No. 87-0228 Jackson, J.

PLEASE TAKE NOTICE THAT ON THE THIRD AFFIDAVIT OF BERNARD H. GOLDSTEIN, WHICH IS ANNEXED HERETO, PETITIONER RESPECTFULLY REQUESTS THE RECUSAL OF HONORABLE THOMAS PENFIELD JACKSON FROM PRESIDING ANY FURTHER WITH RESPECT TO THE ABOVE CAPTIONED CAUSE OF ACTION BASED ON BIAS AND PREJUDICE OF HONORABLE THOMAS PENFIELD JACKSON.

RESPECTFULLY SUBMITTED,

BERNARD H. GOLDSTEIN

DATED JUNE 3, 1987

* * *

THIRD AFFIDAVIT IN SUPPORT OF RECUSAL OF THOMAS PENFIELD JACKSON, DISTRICT JUDGE, CIVIL ACTION NO. 87-0228, BASED ON BIAS AND PREJUDICE OF JUDGE. (28 USC 144 AND 455)

I.

The manner in which this Court's Order

to DENY RECUSAL of JUDGE THOMAS PENFIELD JACKSON, although supposedly legal, certainly reflects an action that is somewhat unethical. (EXHIBIT I) As of this date, no formal Order denying RECUSAL has been entered. Had Plantiff not discovered the entry of EXHIBIT I, Plantiff would have been denied notification of this Court's denial of request for recusal.

II.

For the reason in Paragraph I and the following reasons, this Third Request in support of RECUSAL OF JUDGE THOMAS PENFIELD JACKSON, Civil Action No. 87-0228, is submitted based on BIAS AND PREJUDICE OF JUDGE.

III.

The Defendant, Roy A. Schotland, was appointed Receiver in Civil Actions 83-0780 and 83-0940 by Judge Jackson in April, 1983, and Defendant remains Receiver as of this date. Civil Action 87-0228 was the result of this Court's judgments in CA 83-0780 and 83-0940.

(2)

IV.

Judge Jackson erroneously caused Judgments of $976,822. and $1,995,642. against Plantiff in

deference to opinion of United States Court of Appeals, March 27, 1987, which ruled that OFFSET of Plantiff's interest in the Plan should be applied in order to determine proper amount of Judgment. This principle was never applied by this Court as is evidenced by EXHIBIT II.

V.

Judge Jackson's personal involvement in the criminal prosecution of the Plantiff was reflected in the following:

On February 26, 1986, the following statements were made by Judge Oliver Gasch at the sentencing of Bernard Goldstein: " I spoke briefly in the elevator with Judge Jackson last night. Elevators don't take very long to go from the fourth floor down to the basement, and he got on at the second floor. We did talk briefly, and he told me nothing had been paid on the Judgments." (The amounts of the judgments were before the United States Court of Appeals at the time Judge Jackson made this remark to Judge Gasch.)

VI.

In a letter of March 16, 1987, from Judge Oliver Gasch to Commissioner Don Lopez, U.S. Parole Commission, Northwest Region, the second paragraph of that letter reveals: " In connection with my review of his (Goldstein) latest # 2255

Motion, I discussed the matter with Judge Thomas P. Jackson of our Court. Judge Jackson was the trial Judge in the civil action brought against Goldstein by the Trustee of the Pension Fund which was mismanaged by Goldstein. Judge Jackson advised me that he had entered judgment against Goldstein in the amount of $1 million, and pursuant to the provisions of the RICO Statute, had trebeled the damages so that, in effect, Goldstein has a judgment against him of $3 million.

Note: Although the facts presented by Judge Gasch may be partially incorrect, the inferences made by Judge Jackson further reflect BIAS AND PREJUDICE toward Goldstein. (The judgments were still before the Court of Appeals at this time)

(3)

VII.

The submission of EXHIBIT III (§ 3541. History of Disqualification Statutes, Wright and Miller, Federal Practice Procedure, Civil [1971]) , states "There is a constitutional right to have a neutral and detached Judge preside over Judicial procedures. (Berger et al., v. United States, 255 US 21)

The following sections of § 3541. related to the facts are presented herewith:

3543 - Par. III, IV, V, VI

3544 - Par. III, IV, V, VI

3545 - Par. I

3549 - Par. III, IV, V, VI

SUMMARY

For the reasons stated in Paragraphs I through VII, there is neither a logical nor legal reason for this Court to deny the Plantiff's request for the RECUSAL OF THOMAS PENFIELD JACKSON, DISTRICT JUDGE, CIVIL CASE 87-0228, based on BIAS AND PREJUDICE THAT NOW EXISTS.

RESPECTFULLY SUBMITTED,

BERNARD H. GOLDSTEIN, PRO SE
4100 Massachusetts Ave., N.W.
Washington, D.C. 20016
(202) 364-7170

SWORN TO BEFORE ME

THIS 4th DAY OF JUNE, 1987

NOTARY PUBLIC

My Commission Expires March 1, 1989

[redacted] Judge JACKSON, J.

CIVIL CASE NO. 87-0228

Bernard H. Goldstein F

VERSUS JURY ACTION

Roy O. Schotland, et al

VOL. 1 OF

FROM TO

DEPOSITIONS	
TRANSCRIPTS	
EXHIBITS	
OTHER	

DATE	COURT CLERK'S MEMORANDUM	JUDGE
2-22-87	Status Call	
	Mod Pltfs to secure	
	denied. Mo Pltfs dep	
	to discovery keptd and	
	granted w/ prej	
	Lee P. Mersch. Jackson	

EXHIBIT